Supreme Court, U.S.
FILED
OCT 30 1992
OFFICE OF THE CLERK

No. 92-361

In The Supreme Court of the United States

October Term, 1992

LOUIS W. SULLIVAN, Secretary of Health and Human Services,

Petitioner,

v.

JOEY V. GUTIERREZ,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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13 pp

QUESTION PRESENTED

1. Whether the Court of Appeals correctly held that the district court's post-remand final judgment was the "final judgment" which triggered the 30 day time-limit for filing an application for fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)?

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RESPONDENT'S BRIEF IN OPPOSITION

I.

STATEMENT OF THE CASE

This case is about the timing of an application for attorney fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d). The underlying civil action was a Social Security disability case.

This case belongs to the class of cases in which district courts remanded Social Security claims to the Secretary prior to this Court's decision in *Melkonyan v. Sullivan*, 111 S. Ct. 2157 (1991). The Secretary now wishes to retrospectively label those remands as "final

judgments" within the meaning of the Equal Access to Justice Act ("EAJA") in order to avoid payment of meritorious EAJA applications. This case has an additional key feature: the Secretary acquiesced in the district court's entry of a final judgment after the administrative proceedings on remand were finished.

A. District court

The claimant, Respondent Joey Gutierrez, brought a civil action against the Secretary for review of a denial of disability benefits in the district court, under the judicial review provision of the Social Security Act, 42 U.S.C. § 405(g). On January 30, 1989, the district court found error in the administrative decision, and remanded the claim back to the Secretary for further proceedings. (Pet. App. 33a).

The remand order did not use the terms "final" or "judgment," and did not state that it would "affirm, modify, or reverse" the Secretary's decision. No separate judgment document accompanied the remand order. Neither party objected to the form or content of the remand order.

On remand the Secretary issued a decision fully conceding the claimant's disability, dated June 8, 1989.

The claimant filed a motion for final judgment in the district court on December 12, 1989, accompanied by an application for attorney fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). The Secretary objected to the fee application on two grounds: that the application was untimely because the Secretary's

new administrative decision after remand had constituted the "final judgment in the action" for EAJA purposes,[1] and that the Secretary's position denying disability had been "substantially justified." The objection did not mention the theory now advanced as a basis for certiorari, that the court's remand order had constituted the "final judgment."

The district court rejected the argument that the Secretary's new administrative decision had been the "final judgment," but held that the claimant's motion and fee application were premature, and ordered the Secretary to file his new administrative decision with the court so that a final judgment could be entered. (Pet. App. 17a, 23a).

On May 3, 1990, the Secretary filed a motion for entry of final judgment, accompanied by a copy of the new, favorable administrative decision. (Res. App. 1a).

On May 8, 1990, the district court granted the Secretary's motion for final judgment; "IT IS HEREBY ORDERED that final judgment is entered in the above-captioned case." (Res. App. 3a). Neither party objected to or appealed from this final judgment. It is this May 8, 1990, "final judgment" which served as the "final judgment in the civil action" under the EAJA in claimant's view, agreed with by the district court and court of appeals.

---

[1]The Secretary's longstanding position that the district court would enter a post-remand final judgment for EAJA purposes after all types of remands, *Brown v. Secretary of Health and Human Services*, 747 F.2d 878, 884 (3d Cir. 1984), was abandoned by the Secretary in 1990 in an attempt to benefit from the Ninth Circuit's *sua sponte*, ill-fated ruling that the new administrative decision could be the "final judgment in the action," *Melkonyan v. Heckler*, 895 F.2d 556 (9th Cir. 1990), *rev'd sub nom. Melkonyan v. Sullivan*, 111 S.Ct. 2157 (1991).

The claimant renewed his fee application within 30 days of May 8, 1990. The district court did not time-bar the application, but denied the application on the ground that the Secretary's position denying disability had been "substantially justified." (Pet. App. 25a).

B. Court of appeals

The claimant appealed to the Tenth Circuit on the issue of substantial justification. The Secretary cross-appealed on the issue of timeliness.

During the circuit briefing, this Court's opinion in *Melkonyan v. Sullivan*, 111 S.Ct. 2157 (June 10, 1991) was issued. The Secretary quickly abandoned his argument that the administrative decision on remand had been the "final judgment." The Secretary's new tack was that the district court's original remand order had been the "final judgment."

The court of appeals held in claimant's favor on both issues. *Gutierrez v. Sullivan*, 953 F.2d 579 (10th Cir. 1992); (Pet. App. 1a). The court of appeals agreed with the district court that the fee application was timely filed, based on the district court's May 8, 1990, final judgment. The district court had "made clear that it *had not* entered final judgment at the time of its remand order," and had postponed entry of final judgment until after the remand proceedings were finished. *Id.* at 584; (Pet. App. at 11a) [emphasis in original].

The court of appeals then rejected the district court's finding that the position of the Secretary denying disability had been

substantially justified. The Secretary in this Court has abandoned any claim that his conduct in denying the claimant's disability was substantially justified. Thus, Mr. Gutierrez stands before this Court as a disabled person whose meritorious claim for Social Security benefits was unreasonably denied by the Secretary.

II.

SUMMARY OF THE ARGUMENT

This case should not be held pending disposition of *Sullivan v. Schaefer*, petition for cert. pending, No. 92-311 (filed August 17, 1992). Although the operative facts differ in these two cases, if review is granted, the Court should consider the issues raised in opposition in both *Gutierrez* and *Schaefer*.

This Court should deny review. There is no real split in the circuits. Despite the Secretary's position, all circuit courts have refused to retrospectively time-bar EAJA applications. The circuits have developed varying rules for the timing of fee applications which do not affect entitlement to disability benefits or even attorney's fees.

Gutierrez is consistent with this Court's precedents in *Sullivan v. Hudson*, 109 S.Ct. 2248 (1989), *Sullivan v. Finkelstein*, 110 S.Ct. 2658 (1990), and *Melkonyan v. Sullivan*, 111 S.Ct. 2157 (1991). Similar to *Gutierrez*, *Hudson* involved a fourth sentence remand under 42 U.S.C. § 405(g). *Finkelstein* was not concerned with the timing of attorney fee petitions under the EAJA. And *Melkonyan* held that a

final judgment for purposes of the EAJA must be rendered by a court, not an administrative agency. The dicta in *Melkonyan* are silent about the *Gutierrez* situation - where a district court has retained jurisdiction following the issuance of a fourth sentence remand order and later entered an order of final judgment upon the completion of administrative proceedings.

If review is granted by this Court, summary reversal is inappropriate. Summary reversal would undermine the finality of old judgments rendered by district courts, as well as pending appeals. This Court's precedents interpreting Rule 58, Fed. R. Civ. P., would be silently overruled by summary reversal in *Gutierrez*. Summary reversal by this Court would overturn *Luna v. U.S. Dept. of Health and Human Services*, 948 F.2d 169 (5th Cir. 1991) and preclude the application of equitable tolling to the EAJA statute of limitations. *Sargent v. Sullivan*, 941 F.2d 1207 (4th Cir., No. 90-1521, August 22, 1991) (per curiam) (table) (text available in Westlaw), applying *Melkonyan* on a prospective basis only, would be overruled by summary reversal. Summary reversal by this Court would unnecessarily confuse the judicial review and attorney fee provisions of the Social Security Act, 42 U.S.C. §§ 405(g) and 406(b). Claimants would be forced to file a second civil action to challenge any unfavorable results of the administrative proceedings on remand, if summary reversal is granted. Finally, should this Court grant summary reversal, settled interpretations of "prevailing party" status under the EAJA would be undermined. Claimants would be forced to file fee applications shortly after fourth sentence remands, while the outcome of their

disability claims were still pending.

III.

ARGUMENT

Reasons for considering this opposition to certiorari together with *Sullivan v. Schaefer*

The Secretary asks that this case be held pending disposition of *Sullivan v. Schaefer*, petition for cert. pending, No. 92-311 (filed August 17, 1992). Respondent disagrees. The oppositions to certiorari in both cases should be considered together, and the cases should be heard together if review is granted.

Both the operative facts and the points raised in opposition to certiorari differ in the two cases. By considering this Opposition in addition to *Schaefer's*, the Court can better appreciate why this class of cases is inappropriate for certiorari, let alone summary reversal.

In this case, unlike *Schaefer*, the district court granted a motion by the Secretary to enter a final judgment after the administrative proceedings on remand were finished. The attorney fee application was filed timely in relation to that final judgment, which was entered before this Court's decision in *Melkonyan*. The unappealed final judgment has not been vacated, altered, or amended, and stands undisturbed today. The dangers inherent in recharacterizing or disregarding district courts' old remands and final judgments warn against using retrospective cases such as *Schaefer* and *Gutierrez* to

enunciate general rules governing the timing of EAJA applications in sentence four remand cases.

In this Brief, unlike in *Schaefer*, we question the existence of a real circuit split. All seven circuits which have spoken have rejected the Secretary's attempt to bar fee applications retroactively. The Court should consider the unanimous result reached by seven circuits on these retrospective cases, in addition to the points in opposition to certiorari argued in *Schaefer*.

If review is granted, consideration of more than one fact pattern will help aid the Court's understanding in this uniquely practical area of law which affects thousands of procedurally simple cases in the federal courts each year. Avoiding a wave of litigation such as that which the Secretary triggered following *Melkonyan* should be a priority.

IV.

Reasons for denying review

A. There is no split in the circuits

Certiorari should be denied because there is no circuit split on the result reached by the Tenth Circuit in this case. First Circuit: *Labrie v. Secretary of Health and Human Services*, __ F.2d __ (No. 92-1066, September 30, 1992) (1992 WL 247594) (application timely; district court retained jurisdiction to enter a final judgment following agency proceedings on remand pursuant to sentence four, 42 U.S.C. § 405(g)).

Fourth Circuit: *Sargent v. Sullivan*, 941 F.2d 1207 (No. 90-1521,

August 22, 1991) (per curiam) (table) (text available in Westlaw) (application timely; *Melkonyan* should not be applied retroactively).

Fifth Circuit: *Luna v. Department of HHS*, 948 F.2d 169 (1991) (application timely; doctrine of equitable tolling applied).

Seventh Circuit: *Damato v. Sullivan*, 945 F.2d 982 (1991) (application timely; remand should be viewed as sixth sentence remand under 42 U.S.C. § 405(g) because Secretary acquiesced in remand without an accompanying judgment "affirming, modifying, or reversing" the Secretary); *Cummings v. Sullivan*, 950 F.2d 492 (1992) (application timely; remand should be construed as sixth sentence remand); *Young v. Sullivan*, 972 F.2d 830 (1992) (application timely; neither a fourth sentence or a sixth sentence remand).

Eighth Circuit: *Welter v. Sullivan*, 941 F.2d 674 (1991) (application timely; district court retained jurisdiction under sentence four)); *Schaefer v. Sullivan*, 960 F.2d 1053 (No. 91-3494, April 17, 1992) (per curiam) (table) (text available in Westlaw) petition for cert. pending, No. 92-311 (filed August 17, 1992) (application timely; district court retained jurisdiction under sentence four); *Hafner v. Sullivan*, 972 F.2d 249 (1992) (application timely; district court retained jurisdiction under sentence four).

Eleventh Circuit: *Baker on behalf of Baker v. Sullivan*, 956 F.2d 234 (1992) (application timely; circuit court and district court fourth sentence remand orders not "final judgments" under EAJA). All seven circuits reach the *Gutierrez* conclusion - the EAJA applications are not retrospectively time-barred.

Review by this court is unnecessary. *Gutierrez* represents a

narrow, vanishing class of retrospective cases. The circuit courts are uniformly and correctly rejecting the Secretary's retrospective timeliness objections to fee applications.

Although the circuits are announcing different rules for the future, this variance appears harmless. These cases do not affect parties' *entitlement* to disability benefits, or even to fees, but only the *timing* of the fee applications. The circuits are adequately resolving this tertiary issue.

District courts can now enter their fourth sentence remands in proper form to comply with announced circuit rules. Parties are on notice, and should be able to comply with their circuit's rule governing the timing of fee applications. As argued in the brief in opposition to certiorari in *Schaefer*, the vast majority of federal fee-shifting statutes contain no time limits, and filing deadlines are successfully governed by a patchwork of local rules.

B. *Gutierrez* is consistent with this Court's precedents

The decision below, allowing the district court to retain jurisdiction during the remand proceedings, does not violate this Court's precedents. The decision actually implements *Sullivan v. Hudson*, 109 S.Ct. 2248, 2254, 2255 (1989) ("[i]n many remand situations, the court will retain jurisdiction over the action pending the Secretary's decision and its filing with the court;" "[t]he Secretary concedes . . . that the district court 'retains jurisdiction to review any determination rendered on remand'"). *Hudson* stressed that the administrative proceedings on remand are part and parcel of

the civil action, for EAJA purposes. *Hudson* is the only EAJA precedent from this Court which involved a remand under the fourth sentence of 42 U.S.C. § 405(g).

Sullivan v. Finkelstein, 110 S.Ct. 2658 (1990), is not to the contrary. *Finkelstein* concerned the appealability of a fourth sentence remand order which effectively nullified one of the Secretary's regulations. *Finkelstein* did not reach the issue of whether district court fourth sentence remand orders to administrative agencies are always immediately appealable. *Id.* at 2662. In *Finkelstein*, the district court did not intend to retain jurisdiction, but terminated the civil action. The *Finkelstein* court stated it was not overruling *Hudson* and was not concerned with the timing of attorney fee petitions. *Id.* at 2666 and n.8.

Gutierrez is consistent with *Melkonyan v. Sullivan*, 111 S.Ct. 2157 (1991). *Melkonyan* holds that a final judgment for purposes of the EAJA can only be rendered by a court, not an administrative agency. The remand in *Melkonyan* was not pursuant to the fourth sentence of § 405(g). The conditions specified in the dicta regarding fourth sentence remands did not occur in this case. The *Melkonyan* dicta stated:

> in § 405(g) actions, remand orders must . . . accompany a final judgment affirming, modifying, or reversing the administrative decision in accordance with sentence four . . . In Sentence four cases, the filing period begins after the final judgment ("affirming, modifying, or reversing") is entered by the court and the appeal period has run, so that the judgment is no longer appealable. *Id.* at 2165.

Here, the remand order did not accompany a final judgment affirming, modifying, or reversing the administrative decision. Instead, the district court retained jurisdiction following the issuance of its fourth sentence remand order and later entered an order of final judgment upon the completion of administrative proceedings. The *Melkonyan* dicta are silent about this type of situation.

V.

Reasons for allowing full briefing and argument, if review is granted

The Secretary has inappropriately requested summary reversal. Barring the fee application in this case would entail considering and rejecting each of the various grounds employed by the circuit courts to save such applications, and other grounds the circuit courts found unnecessary to reach.

Contrary to the assertion of the Secretary, this Court has not been fully briefed on the issue of when a final judgment occurs for EAJA purposes in cases containing a fourth sentence remand. The issue was briefed only glancingly in *Melkonyan*, because the parties agreed that no fourth sentence remand occurred in that case.

This Court should be fully informed about how its ruling would affect jurisprudence in several areas of law.

A. Judgments

Summary reversal could undermine the finality of old judgments on the merits of Social Security disability cases. The Secretary's

position seems to be that the fourth sentence remand ended the district court's jurisdiction, depriving the final judgment issued May 8, 1990, of any effect. There are countless old cases where the district court entered a remand (now classified as under sentence four), benefits were again denied administratively on remand, and the district court subsequently reversed, entering what all parties justifiably considered to be a final judgment entitling the disabled individual to the benefits they now receive.

The timeliness of pending appeals on the merits of disability cases would also be undermined. Appeals from "final judgments," whenever there had been prior court remands which could be classified as under sentence four of § 405(g), would be vulnerable to dismissal.

B. Rule 58

Summary reversal would silently overrule the Court's precedents interpreting Rule 58, Fed. R. Civ. P. The EAJA requires not only a "final judgment," but one which has become unappealable, to trigger the 30-day limit for filing fee applications. 28 U.S.C. § 2412(d)(2)(G). Holding that the remand order in this case was effective as a final judgment and became non-appealable despite its lack of compliance with Rule 58 would seriously undermine the Court's prior interpretations of Rule 58, and affect all types of cases in the federal courts.

Rule 58 states that "[e]very judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered [on the clerk's docket]." *United States v. Indrelunas*,

411 U.S. 216 (1973) (the separate document requirement must be mechanically applied). Rule 58 can be waived to *allow* appeal, but not to *prohibit* appeal. *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978).

C. Equitable estoppel

Summary reversal would overturn *Luna v. U.S. Dept. of Health and Human Services*, 948 F.2d 169, 173 (5th Cir. 1991). *Luna* applied equitable tolling of the 30-day EAJA filing limit to save an EAJA application which was filed long after a fourth sentence remand order which was not considered to be the "final judgment" at the time it was entered.

The Secretary from before 1984 until after 1989 (the year of the remand order in this case) took the position that EAJA applications were inappropriate at the time of a court's remand order, *Brown v. Secretary of HHS*, 747 F.2d 878, 884 (3d Cir. 1984) (a "fourth sentence" remand); Secretary's Brief at 11-12, *Melkonyan v. Sullivan*, 111 S.Ct. 2157 (arguing that the 30-day period did not begin to run until the agency reached a new administrative decision, long after the court's remand).

The 30-day EAJA filing limit, even though it was previously termed "jurisdictional" by many lower courts, now clearly operates as a statute of limitations and is subject to waiver, tolling, and estoppel. *Irwin v. Veterans Administration*, 111 S.Ct. 453, 456-57 (1990) (limitations periods for statutory claims against the government are subject to equitable estoppel unless Congress specifically states the contrary; words like "shall file" are not a

specific Congressional statement to the contrary).

D. Retroactivity

Summary reversal would silently overrule *Sargent v. Sullivan*, 941 F.2d 1207 (4th Cir., No. 90-1521, August 22, 1991) (per curiam) (table) (text available in Westlaw), and many district courts which have held that the dicta in *Melkonyan* are to apply on a prospective basis only. Many strong arguments for non-retroactive application of *Melkonyan's* dicta should be fully considered if the Court takes review of this case. *See* Brief in Opposition to Petition for Certiorari, *Sullivan v. Schaefer*, No. 92-311 (filed August 17, 1992).

E. Social Security Act

Summary reversal would extend the *Melkonyan* dicta into a new, binding rule: that district courts do not have jurisdiction to enter post-remand final judgments after fourth sentence remands. The district courts have exercised that jurisdiction for many years, apparently since § 405(g) was enacted in 1939. The change would make an unnecessary tangle of judicial review and attorney fee provisions of the Social Security Act, 42 U.S.C. §§ 405(g), 406(b).

Denying post-remand jurisdiction in the district court leads to the "second civil actions" theory under which the claimant is forced to file a second civil action to challenge any unfavorable results of the administrative proceedings on remand. *Frizzel v. Sullivan*, 937 F.2d 254 (5th Cir. 1991). The "second civil action" theory would unnecessarily multiply litigation and paperwork, entwine the

jurisdiction of the first judge to enforce the remand order with the jurisdiction of the second judge to hear the new challenge, and create vexing litigation over the timeliness of filing the second action.

Denying post-remand jurisdiction in the district court would also prevent the proper operation of the attorney fee section of the Social Security Act, 42 U.S.C. § 406(b)(1). That section was not examined in *Melkonyan*. Section 406(b)(1) presupposes the possibility of a judgment, by reason of which the claimant is entitled to past-due benefits, at the end of each successful Social Security court case as the basis for approving the 25% contingent attorney fee.

Since a fourth sentence remand does not entitle the claimant to any past-due benefits, the attorney who wins benefits for the claimant at the administrative level after a fourth sentence remand must be able to obtain a later judgment (by reason of which the claimant is entitled to past-due benefits) in the same civil action. Otherwise the attorney could never be paid for the services rendered in the district court obtaining the remand. Congress could not have intended to create this gaping hole.

A common-sense reading of § 405(g) would preserve district court jurisdiction to enter a final judgment after remand. The phrase, "enter . . . judgment . . . with or without remanding," 42 U.S.C. §405(g) (fourth sentence), does not need to imply simultaneous entry of the remand and the judgment. Another accepted meaning of "with" is causal or instrumental, as in "enter judgment with or without oral argument." The decision below preserves the existing, workable structure of Social Security law by using that interpretation.

F. Equal Access to Justice Act

Summary reversal would undermine settled interpretations of "prevailing party" under the EAJA. Before *Melkonyan*, remands did not produce prevailing party status. *Hudson, supra*, 109 S.Ct. at 2255. Holding that EAJA applications are due a short time after a fourth sentence remand would be either inconsistent with the plain language of the EAJA which requires the fee application to show that the claimant "*is*" a prevailing party, 28 U.S.C. § 2412(d), or inconsistent with the case law which interprets "prevailing party" under fee-shifting statutes. *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. __, 109 S.Ct. 1486 (1989).

The Secretary would require a "protective" application at the time of the remand, to be considered only if the claimant wins benefits through the administrative proceedings on remand. No circuit has adopted the Secretary's position. *Hafner v. Sullivan*, 972 F.2d 249 (8th Cir. 1992) ("the ultimate in laying traps for the unwary and senselessly cluttering court dockets"); *Labrie v. Secretary of HHS*, _ F.2d __ (1st Cir., No. 92-1066, September 30, 1992) (1992 WL 247594) at n. 17.

Forcing claimants to file fee applications shortly after fourth sentence remands, while the outcome of the disability claim is still within administrative discretion, is inconsistent with Congress's intent in enacting 28 U.S.C. § 2412(d)(2)(G). That section defines "final judgment" as one which is no longer appealable, thus protecting claimants from having to tip their hands by filing for fees before the

merits are put to rest. *McDonald v. Schweiker*, 726 F.2d 311, 315 (7th Cir. 1983) (Posner, J).

VI.

CONCLUSION

The Court should deny review. Denial of review will limit the expansion of *Melkonyan's* dicta and preclude the Secretary from eliminating meritorious EAJA claims of disabled individuals.

If the Court grants review, full briefing and argument should be employed to produce an affirmance of the Tenth Circuit's sound decision and a clear, fair, practical rule of EAJA application timing for the future.

Respectfully Submitted,

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October 30, 1992

APPENDIX A

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FILED IN UNITED STATES DISTRICT COURT, DISTRICT OF UTAH
MAY 03 1990
MARKUS B. ZIMMER, CLERK
BY ... DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

JOEY GUTIERREZ,

Plaintiff,

vs.

LOUIS W. SULLIVAN, Secretary of Health and Human Services,

Defendant.

88-C-0331A

MOTION FOR ENTRY OF FINAL JUDGMENT

Pursuant to the court's Order of April 20, 1990, the United States, for and on behalf of the Secretary of Health and Human Services, requests this court to enter final judgment in the above-captioned case on the following ground:

On June 8, 1989, the Appeals Council for the Secretary of Health and Human Services rendered its final decision in this case. This decision is fully favorable to the plaintiff. (A copy of the final decision is attached to this motion.)

BEST AVAIL

DATED this 3rd day of May, 1990.

DEE BENSON
United States Attorney

RICHARD D. PARRY
Assistant United States Attorney

ABLE COPY

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

MAY 03 1990

CLERK

JOEY GUTIERREZ,

Plaintiff,

vs.

LOUIS W. SULLIVAN, Secretary of Health and Human Services,

Defendant.

88-C-0331A

ORDER FOR ENTRY OF FINAL JUDGMENT

Based upon the government's Motion for Entry of Final Judgment and good cause appearing therefor,

IT IS HEREBY ORDERED that final judgment is entered in the above-captioned case.

DATED this 8 day of May, 1990.

BY THE COURT:

ALDON J. ANDERSON, Judge
United States District Court

Copies mailed to counsel 5-9-90:
Maureen D. Cleary, Esq.
Richard Parry, AUSA

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